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IN THE

Supreme Court of the United States

THE NEW YORK TIMES COMPANY, INC., NEWSDAY, INC., THE TIME INCORPORATED MAGAZINE COMPANY, LEXIS/NEXIS, AND UNIVERSITY MICROFILMS INTERNATIONAL,

Petitioners,

-v.-

JONATHAN TASINI, MAY KAY BLAKELY, BARBARA GARSON, MARGOT MIFFLIN, SONIA JAFFE ROBBINS, AND DAVID S. WHITFORD,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL GEOGRAPHIC SOCIETY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a publisher's reproduction and distribution of its entire periodical not only in print, but also electronically, is privileged under the Copyright Act or instead infringes upon the copyrights held by contributing freelance authors.

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INTEREST OF THE *AMICUS*[1]

The National Geographic Society is the world's largest nonprofit scientific and educational organization, with approximately ten million members worldwide. Since its founding in 1888, the Society's mission has been "to increase and diffuse geographic knowledge" in the broadest sense. The Society pursues that mission in a variety of ways, including creating a $100 million foundation to promote geographic education; issuing grants for scientific research and exploration; maintaining an acclaimed Explorers-in-Residence program; conducting national and international geography bees with millions of student participants annually; launching initiatives to increase public awareness and knowledge of geography; and producing and distributing a wide variety of mission-related products, including periodicals, television programs, books, maps and atlases, and classroom products. In recent years, pursuant to a letter ruling sought and obtained from the Internal Revenue Service, the Society has placed several divisions into wholly-owned taxable subsidiaries. All parts of the organization, including these divisions, promote the Society's historic educational and scientific mission, and any and all revenues are used to further that mission.

The Society has a strong interest in this case in its capacity as the publisher of a monthly official journal, *National Geographic* magazine. For many years, the Society has reproduced back issues of the magazine in bound volumes, microfiche, and microfilm. With the advent of CD-ROM technology in recent years, the Society in 1997 produced "The Complete National Geographic," a thirty-disc CD-ROM set

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amicus*, its counsel, or its insurer made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court, pursuant to S. Ct. R. 37.3.

containing each monthly issue of the magazine for the 108 years from 1888 through 1996. The issues appear chronologically, from the earliest at the beginning of the first disc to the latest at the end of the thirtieth disc. There are no changes to the content, format, or appearance of any issue reproduced in the CD-ROM set. Every page of every issue remains as it was in the original print version, including all page arrangements, articles, photographs, graphics, advertising, and attributions. A search engine allows the user to search the index electronically, just as users have long been able to search the magazine's traditional paperbound index.

Recently, the Society has become the target of several lawsuits by freelance authors and photographers who contend that the Society infringed their copyrights by reproducing their contributions to the magazine in the CD-ROM set, even though the plaintiffs authorized the use of their contributions in the magazine and the set reproduces each issue of the magazine exactly as it originally appeared in print. *See Greenberg v. National Geographic Soc'y*, No. 97-3924-CIV, 1998 U.S. Dist. LEXIS 18060 (S.D. Fla. May 14, 1998), *appeal pending*, No. 00-10510-C (11th Cir.) (argued Oct. 3, 2000); *Faulkner (Sally) v. National Geographic Soc'y*, No. 99 Civ. 12488 (S.D.N.Y.); *Ward v. National Geographic Soc'y*, No. 99 Civ. 12385 (S.D.N.Y.); *Faulkner (Douglas) v. National Geographic Soc'y*, No. 97 Civ. 9361 (S.D.N.Y.). The Society has defended these lawsuits on the ground, among others, that 17 U.S.C. § 201(c), the statutory provision at issue here, confers a privilege upon the publishers of collective works to reproduce and distribute an individual freelance contribution to a collective work "as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." Because the Second Circuit dramatically and erroneously narrowed the scope of that statutory privilege, and because most of the pending cases have been filed in that Circuit, the Society respectfully urges this Court to reverse the judgment.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Copyright Act of 1976 strikes a fundamental balance between the interests of freelance authors, on the one hand, and publishers of collective works, on the other: the author owns the copyright in his individual contribution, while the publisher owns the copyright in the overall collective work. The decision below upsets that balance by drastically curtailing the publisher's statutory privilege to reproduce and distribute its collective work in new media, including electronic databases and CD-ROM. The decision thereby violates the bedrock principle that the Copyright Act is medium neutral: it applies *regardless* of the medium (or combination of media) in which a work is expressed. The publisher of a printed newspaper like *The New York Times*, a paperbound journal like *National Geographic* magazine, an online magazine like *Slate* or *Salon*, or any other collective work is entitled to reproduce and distribute that collective work in any medium (or combination of media) it chooses: newsprint, electronic databases, microfilm, microfiche, CD-ROM, or even other media not yet invented. Technological developments may allow collective works to be stored, retrieved, and searched in new ways, but such developments do not strip publishers of their statutory privilege to reproduce and distribute their collective works.

The error below stems from a flawed approach to statutory construction. The Copyright Act authorizes the publisher of a collective work to reproduce and distribute an individually copyrighted contribution "as part of [1] that particular collective work, [2] any revision of that collective work, and [3] any later collective work in the same series." 17 U.S.C. § 201(c). The Second Circuit construed these three categories "narrowly" as mutually exclusive, limited in scope by their order, and confined to particular factual examples devised by the court. Pet. App. 10a-13a. That interpretation has no basis in law or logic: there are no canons of construction that statutory categories must be read as mutually exclusive, that the order of such categories limits their scope, or that such

categories may be confined to particular factual examples. The three categories in the statute simply describe three different uses of contributions to collective works, and the Second Circuit erred by forcing all three into a wholly artificial construct. Applying the plain meaning of the statute, all three categories authorize publishers to reproduce and distribute collective works in new media, just as petitioners have done here. Because the Second Circuit concluded otherwise, the judgment should be reversed.

ARGUMENT

THE SECOND CIRCUIT ERRED IN INTERPRETING AND APPLYING SECTION 201(C).

The Second Circuit's decision is based upon the premise that each of the three categories set forth in section 201(c)—(1) "that particular collective work," (2) "any revision of that collective work," and (3) "any later collective work in the same series"—must be "narrowly" construed as mutually exclusive, limited in scope by their order, and confined to particular factual examples devised by the court. Pet. App. 10a-13a. That premise is mistaken, and led the Second Circuit to transform these broad and overlapping categories into narrow pigeonholes separated by substantial gaps.

The court below began with the unremarkable proposition that "[t]he meaning of particular phrases must be determined in context," Pet. App. 10a (internal quotation omitted), and thus "the second clause must be read in the context of the first and third clauses," *id.* The court, however, took that proposition to mean that each category should have a meaning separate and independent from the others. The court thus proceeded to describe the first category as a "floor," the third category as a "ceiling," and the second category as somewhere in between. *Id.* To prevent the categories from overlapping, the court limited the first category to "a specific edition or issue of a periodical," the second category to "later editions of a particular issue of a periodical, such as the final edition of a

newspaper," and the third category to "a new edition of a dictionary or encyclopedia." *Id.* at 10a, 11a.

The plain language of the statute provides no basis for thus narrowing the categories. The principle that statutory terms should be construed "in context" does not mean that their scope should be construed as mutually exclusive. To the contrary, Congress often sets forth lists of overlapping terms or categories precisely to *avoid* any gaps in coverage. The aiding-and-abetting statute is a good example: it punishes a person who "aids, abets, counsels, commands, induces, or procures" a federal crime. 18 U.S.C. § 2. No one would seriously argue that it was necessary (or even possible) to devise a meaning for "aids" that does not overlap with "abets." Such a "belt-and-suspenders" approach is common throughout the U.S. Code. *See, e.g.*, 29 U.S.C. § 1144(d) (ERISA's preemption provision shall not be construed to "alter, amend, modify, invalidate, impair, or supersede" any other federal law). Indeed the Copyright Act itself is replete with overlapping terms. *See, e.g.*, 17 U.S.C. § 101 ("'Literary works' are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied"); 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery"). The Second Circuit's assumption that Congress intends a series of statutory words or phrases to be mutually exclusive is especially incongruous in this case, where Congress linked the three categories in section 201(c) with the conjunctive "and," rather than the disjunctive "or," indicating that a given publication could fall within more than one category of the collective-works privilege.

This approach does not challenge the canon of construction (invoked by the Second Circuit, *see* Pet. App. 12a) that courts should give some effect to every word in a statute if possible.

See, e.g., Bailey v. United States, 516 U.S. 137, 145-46 (1995). That canon simply provides that courts should try to avoid *complete* overlap between statutory terms or phrases, on the theory that Congress does not enact superfluous words into law. *See id.* But there is no basis in law or logic to stretch that canon, as the Second Circuit did here, to mean that courts should try to avoid *any* overlap between statutory words or phrases. To the contrary, as noted above, Congress often seeks to *avoid* statutory gaps by using overlapping terms, so it would be perverse for courts to *create* such gaps by artificially narrowing those terms.

Nor is there any merit to the Second Circuit's assertion that the three categories of the collective-works privilege must be construed "narrowly" because they form an "exception to the general rule that copyright vests initially in the author of the individual contribution." Pet. App. 12a. Section 201(c) represents a compromise between the rights of freelance authors and the rights of publishers of collective works, and the statutory privilege conferred upon the publishers is no less integral a part of the statutory scheme than the ownership rights conferred upon the authors. *See, e.g.*, H.R. Rep. No. 1476, 94th Cong., 2d Sess. 122 (1976) (noting that section 201(c) "represents a fair balancing of equities" between freelance authors and publishers, and that the publishers' privilege is the "essential counterpart" of the authors' rights). To construe the publishers' privilege "narrowly" would be to upset the balance established by Congress. *See, e.g., Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (noting that a statute's purpose is reflected as much in the scope of its limitations as in the scope of its coverage); *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986) (same).

The Second Circuit thus erred by interpreting the collective-works privilege of section 201(c) solely by reference to the "context," rather than the plain meaning, of the statutory text. There is no reason to conclude that Congress intended the three categories of section 201(c) to mean anything other than what

they say, and in particular to be construed "narrowly" as mutually exclusive, limited in scope by their order, and confined to the particular examples devised by the court. To the contrary, as explained below, the plain meaning of those categories reveals them to be broad and overlapping.

A. "That Particular Collective Work"

The Second Circuit characterized the first category ("that particular collective work") as the statutory "floor," limited to "a specific edition or issue of a periodical." Pet. App. 10a. That characterization reflects an unduly narrow interpretation of this category.

There is nothing in the statute that limits a publisher's privilege to reproduce and distribute a "particular collective work" exclusively to the "specific edition or issue of a periodical" in which that work originally appeared. *Id.* Under the statute, a publisher is entitled to reproduce and distribute an individual freelance contribution as a part of a "particular collective work" *regardless* of the medium (or combination of media) in which that collective work originally appeared. The privilege, after all, is not limited to "that particular collective work in the particular medium originally published"; to the contrary, the scope of copyright protection of a collective work (or any other original work of authorship) is neutral as to the medium of expression. *See* 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of authorship fixed in *any* tangible medium of expression, *now known or later developed*, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.") (emphasis added); *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693, 702-703 (2d Cir. 1998) (noting that copyright protection does not "'depend upon the form or medium in which the work is fixed'") (quoting H.R. Rep. No. 94-1476, at 52 (1976)); *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 432-433 (4th Cir. 1986) ("[C]opyright protection is granted 'in original works of authorship fixed in any tangible medium.'") (quoting 17 U.S.C. § 102(a)); *Apple*

Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1248 (3d Cir. 1983) ("Under the statute, copyright extends to works in any tangible means of expression"). Accordingly, the publisher can reproduce and distribute an individual freelance contribution in *any* medium (or combination of media) as long as that contribution remains part of the "particular collective work" in which it originally appeared.

"The Complete National Geographic" published by *amicus* provides a good example of a "particular collective work" reproduced in a new medium. That product consists of all issues of *National Geographic* magazine from 1888 to 1996 in a thirty-disc CD-ROM set. This new medium offers several advantages over the original paperbound journals, including the ability to store large amounts of information in a small amount of space and electronic searching capability. *See, e.g., Matthew Bender & Co.*, 158 F.3d at 697 n.4. Because the CD-ROM reproduction is image-based, every page of every issue remains precisely as it was in the original paperbound version, including all page arrangements, articles, photographs, graphics, advertising, and attributions. Under these circumstances, the Society has not exploited any individual contribution separate and apart from the "particular collective work" in which it originally appeared; the entire "particular collective work" has simply been reproduced in the medium of CD-ROM, just as it has long been reproduced (without challenge) in the media of microfilm and microfiche. Because copyright law, as noted above, is medium-neutral, the Society does not lose its statutory privilege to reproduce and distribute the original paperbound issues of *National Geographic* magazine in any of these other media.

That conclusion is the same regardless of whether each issue of *National Geographic* magazine is reproduced on its own CD-ROM disc, or whether multiple issues are grouped together on a single disc. As noted above, one of the key advantages of CD-ROM technology is the ability to reproduce vast amounts of information in a very limited space: a collection of

paperbound magazines that would have taken up a large room now fits comfortably onto thirty discs in a small box. Each individual contribution remains part of the "particular collective work" in which it originally appeared, even though that "particular collective work" is reproduced alongside other collective works on a single disc. A "particular collective work," in other words, does not cease to exist when grouped with other collective works. This is, in essence, no different than putting together multiple paperbound issues of *National Geographic* magazine in a bound volume, or reproducing multiple issues of the magazine together on a single roll of microfilm or a single sheet of microfiche, which the Society has been doing for years. Nothing in the Copyright Act prevents publishers from taking advantage of the technological benefits of other media.[2]

Nor does it matter whether the CD-ROM set itself, or any individual disc within that set, is deemed to be a new collective work or compilation. An individual contribution is no less a part of a "particular collective work" if that collective work in turn becomes part of an even larger collective work. One collective work can form part of another collective work, just as a Sunday magazine forms part of a Sunday newspaper. The creation of a new collective work (whether or not copyrightable or copyrighted in its own right) is simply not inconsistent with the preservation of the "particular collective work" in which an individual freelance contribution originally appeared.

The Second Circuit, however, reached a different conclusion with respect to the General Periodicals OnDisc CD-ROM,

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[2] As long as the individual contribution remains in the "particular collective work" in which it originally appeared, in fact, it does not matter *what else* appears alongside that "particular collective work" in a new medium. Given the recent advances in DVD technology, for example, the Society could reproduce an issue of the magazine on a single disc along with television programs and/or lectures on the same topics as the articles in that issue. Similarly, the Society could reproduce back issues of the magazine on its website, even though the website also includes substantial other materials.

which includes exact image-based reproductions of *The New York Times* Sunday book review and magazine sections. *See* Pet App. 5a, 16a. The court held that the statutory privilege did not apply to that product because "it also contains articles from numerous other periodicals," and thus "is at best a new anthology." *Id.* at 17a. In this regard, the ostensibly textualist court relied on a passage in the legislative history stating that section 201(c) was not intended to authorize a publisher to "include [an individual contribution] in a new anthology." H.R. Rep. No. 94-1476, at 122-23 (1976). But that passage simply makes the point that a publisher cannot *remove* an individual freelance contribution from a "particular collective work" and include it in a "new anthology"; contrary to the Second Circuit's apparent belief, the passage does not state that a publisher cannot include a "particular collective work" in its *entirety* in a "new anthology." Thus, even if a given CD-ROM disc or set (or a bound volume, roll of microfilm, or sheet of microfiche) is characterized as a "new anthology," there is no basis for holding that a "particular collective work" ceases to be a "particular collective work" simply because it is grouped with other materials. The legislative history's reference to a "new anthology" does not compel a reading of the statute that strips publishers of their statutory privilege to reproduce their collective works in new media just because those media allow the aggregation of multiple collective works.

The Second Circuit also placed undue reliance on the search capability of new media. In particular, the court asserted that a user's ability to "retriev[e articles] according to criteria unrelated to the particular edition in which the articles first appeared" strips a publisher of the statutory privilege. Pet. App. 16a. However, a "particular collective work" does not cease to be a "particular collective work" just because it is reproduced in a new medium that makes it easier for a user to search for individual contributions. Every medium offers its own advantages and disadvantages. As long as an individual freelance contribution remains in the "particular collective work" in which it was originally published, the relative ease of

searching that "particular collective work" is immaterial. Microfilm and microfiche, for example, may be easier to search than books, but that does not remove those media from the scope of the privilege. The search engine of a CD-ROM is essentially the same as the index to a collection of paperbound magazines; indeed, the search engine of "The Complete National Geographic" CD-ROM searches an electronic version of the traditional paperbound index, rather than the full text of individual articles. Surely, the Society did not lose its privilege to reproduce its collective works the first time it published an overall index to its paperbound magazines, and thereby rendered them easier to search. The relative ease of searching is simply irrelevant to the scope of the statutory collective-works privilege.

B. "Any Revision of That Collective Work"

The Second Circuit next characterized the second category ("any revision of that collective work") as a no-man's-land between the statutory "floor" and "ceiling," limited to "later editions of a particular issue of a periodical, such as the final edition of a newspaper." Pet. App. 10a. Again, that characterization reflects an unduly narrow interpretation of this category.

There is nothing in the statute that limits a publisher's privilege to reproduce and distribute "any revision of that collective work" exclusively to "later editions of a particular issue of a periodical, such as the final edition of a newspaper." *Id.* To be sure, a later edition of a newspaper is an *example* of a "revision," but it does not remotely exhaust the category. A "revision" of a publication is "a new, amended, improved, or up-to-date version of" that publication. *Webster's Third New Int'l Dictionary* 1944 (1976). And the statute extends the broad word "revision" to its broadest limits by modifying it with the word "any." *See, e.g., Citizens' Bank of La. v. Parker*, 192 U.S. 73, 81 (1904) ("The word any excludes selection or distinction. It declares the exemption without limitation."). As the district court below pointed out, there is no basis for

assuming that "any revision" is limited only to *minor* changes; a "revision" can be either major or minor in scope. Pet. App. 58a-61a, 72a. The statute thus allows publishers to revise their overall collective works without fear of incurring copyright liability to the authors of individual freelance contributions.

Again, "The Complete National Geographic" published by *amicus* provides a good example. Even assuming that the Second Circuit were correct that a "particular collective work" is limited to the "specific edition or issue of a periodical" in which that work originally appeared, the transfer of that issue to a new medium (like CD-ROM) would at most amount to a "revision" of the issue. Again, that conclusion is not altered by the fact that multiple issues can be transferred onto a single CD-ROM disc (a key advantage of CD-ROM technology): a "revision" is no less a "revision" just because it is placed in a new medium in which it is joined with other "revisions." Indeed, the district court in *Greenberg,* relying on the district court's opinion in this case, concluded that "The Complete National Geographic" was a "revision" of the original paperbound issues of the magazine, and thus rejected a claim of copyright infringement. *See Greenberg v. National Geographic Soc'y*, No. 97-3924-CIV, 1998 U.S. Dist. LEXIS 18060, at *7-10 (S.D. Fla. May 14, 1998), *appeal pending*, No. 00-10510-C (11th Cir.).

The Second Circuit sought to justify its narrow interpretation of "any revision" by asserting that a broader interpretation would render "superfluous" the third statutory category permitting the reproduction and distribution of an individual freelance contribution as part of "a later collective work in the same series." Pet. App. 12a. That assertion is baseless. The second category allows publishers to *revise* their collective works without losing the privilege to reproduce and distribute individual freelance contributions, while the third category allows publishers to *remove* individual freelance contributions from their original collective work altogether and place them in new collective works in the same series. For example, as

noted below, the third clause would allow a publisher to "reprint a contribution from one issue in a later issue of its magazine," even though the later issue was not a "revision" of the original. H.R. Rep. No. 94-1476, at 122-23 (1976). To give the "any revision" language its ordinary meaning (well beyond "later editions of a particular issue of a periodical, such as the final edition of a newspaper," Pet. App. 10a), would in no way threaten to swallow up the "same series" category.

C. "Any Later Collective Work in the Same Series"

Finally, the Second Circuit characterized the third category ("any later collective work in the same series") as the statutory "ceiling," limited to "a new edition of a dictionary or encyclopedia." Pet. App. 10a-11a. Yet again, that characterization reflects an unduly narrow interpretation of this category.

There is nothing in the statute that limits a publisher's privilege to reproduce and distribute "any later collective work in the same series" exclusively to "a new edition of a dictionary or encyclopedia." *Id.* To the contrary, the legislative history specifically characterizes a new edition of an encyclopedia as a "revision": "[A] publishing company . . . could reprint an article from a 1980 edition of an encyclopedia in a 1990 *revision* of it." H.R. Rep. No. 94-1476, at 122-23 (1976) (emphasis added). The word "series" is not limited to dictionaries or encyclopedias, but rather encompasses "a number of successive parts or volumes of a periodical publication." *Webster's Third New Int'l Dictionary* 2073 (1976).

Again, to the extent that a CD-ROM collection (or a bound volume, microfilm, or microfiche version) of a particular magazine is deemed to be a "new" collective work, it is entirely plausible to characterize it as a "later collective work in the same series," *i.e.*, that particular magazine series. As noted above, the legislative history specifically contemplates that section 201(c) allows a publisher to "reprint a contribution

from one issue in a later issue of its magazine." H.R. Rep. No. 94-1476, at 122-23 (1976). There is no reason why a single "series" must be limited to a single medium: a magazine could certainly decide to publish half its circulation in paperbound format and the other half in CD-ROM format. As long as the series involves the same magazine, the medium of publication is irrelevant.

Indeed, it makes no sense to think that Congress meant to allow publishers to reproduce an individual freelance contribution in an entirely new edition of an encyclopedia, or an entirely different issue of a particular magazine, but did not mean to allow publishers to reproduce their collective works in *precisely identical format* in a new medium like CD-ROM. Needless to say, the differences between a new edition of an encyclopedia, or a different issue of a particular magazine, are far more substantial in scope and materiality than any difference between a particular issue of a magazine printed on paper and reproduced on CD-ROM. The Second Circuit's ostensibly textualist approach thereby not only ignores the statute's plain meaning, but also creates anomalies that should not lightly be attributed to Congress.

* * *

The decision below represents not only an erroneous and anomalous interpretation of the Copyright Act, but also a radical break with settled understandings. Freelance authors have never before complained about the reproduction of collective works in bound volumes, microfilm, or microfiche. Their current grievance thus appears to be not so much about the longstanding practice of reproducing collective works in new media, but about the fact that recent technological developments like CD-ROM may enhance the commercial value of such reproduction. But the potential value of a particular reproduction has no bearing on the scope of the collective-works privilege, and long-established (and

unchallenged) media of reproduction such as microfilm and microfiche have substantial commercial value.[3]

At bottom, there is no unfairness in a system that grants freelance authors ownership of the copyright in their individual contributions (which they can exploit in any medium they please), while granting publishers ownership of the copyright in their collective works (which they can reproduce in any medium they please). By overturning settled understandings in the publishing industry, the decision below threatens to eradicate newspaper and periodical archives created pursuant to such understandings, and to undermine copyright law's constitutional goal of "promot[ing] the Progress of Science and useful Arts." U.S. Const. art. II, § 8, cl. 8. Needless to say, if Congress intended to upset settled expectations in the manner effected by the court below, it could and presumably would have been far more explicit. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1315 (2000); *Jones v. United States*, 526 U.S. 227, 228 (1999).

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

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[3] Indeed, there is an entire industry devoted to reproducing newspapers and periodicals in microfilm and microfiche pursuant to licenses with publishers, and such reproductions have substantial commercial value. For example, a set of 170 microfilm rolls reproducing all issues of *National Geographic* magazine since 1888 currently sells for approximately $37,000, and a set of 717 microfiche cards reproducing all issues of the magazine since 1978 currently sells for approximately $3,000. Needless to say, these sums dwarf the current retail price of less than $100 for the thirty-disc CD-ROM set reproducing all issues of the magazine since 1888—which is one reason why CD-ROM technology holds such great promise for expanding the availability of historical archives to the general public.

Respectfully submitted,

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